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ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

NICOLE HIGGINS,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0712-CR-1099
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

July 28, 2008

MATHIAS, Judge

Nichole D. Higgins (“Higgins”) pleaded guilty in Marion Superior Court to Class C felony forgery and Class D felony attempted theft. Higgins was sentenced to an aggregate term of four years to be served consecutively to a sentence under a different cause number. Higgins appeals arguing that the trial court abused its discretion when it failed to consider her guilty plea as a mitigating factor.

We affirm.

Facts and Procedural History

On April 4, 2006, Higgins wrote a check for \$28.15 on the account of Candice Riddles made out to Gas America for fuel and cigarettes. Higgins did not have the authority to write a check on that account. On June 8, 2006, Higgins was charged with Class C felony forgery and Class D felony theft. She was subsequently arrested on August 1, 2006. On January 3, 2007, Higgins pleaded guilty as charged. Pursuant to the plea agreement, Higgins would be released to participate in a drug diversion program. If she successfully completed a minimum of twelve months in the drug diversion program, the charges would be dismissed.

On January 24, 2007, Higgins failed to appear for a diversion program progress review hearing and a warrant was issued. The warrant was recalled the next day. On February 21, 2007, Higgins failed to appear for a diversion program progress review hearing. Higgins also failed to appear at the March 28, 2007 progress hearing. On April 18, 2007, Higgins was placed in jail for seven days. On May 2, 2007, the trial court ordered a pre-sentence investigation report.

On August 8, 2007, after determining that Higgins had failed to comply with the requirements of the drug diversion program, the trial court entered a judgment of conviction and sentenced her to two years. Over the State's objection, the trial court granted Higgins's request for a short stay to allow her to put her affairs in order. On August 15, 2007, Higgins again failed to appear. On October 16, 2007, the trial court revised Higgins's sentence from two years to four years for the Class C felony forgery and two years for the Class D felony attempted theft to be served concurrently to each other but consecutively to a previously ordered sentence.

Higgins appeals.

Discussion and Decision

Higgins argues that the trial court abused its discretion when it failed to consider her guilty plea as a mitigating factor. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007), *modified on reh'g*, 875 N.E.2d 218 (2007). A guilty plea is not automatically a significant mitigating factor. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). Where the State has received a significant benefit from the guilty plea, the defendant is likewise entitled to a significant benefit in return such that the guilty plea will be given significant weight. Anglemyer v. State, 875 N.E.2d 218, 221 (Ind. 2007). However, if the defendant has received a substantial benefit or where the evidence is such that the decision is a pragmatic one, the fact of a guilty plea does not rise to the level of significant mitigation. Id.

Higgins argues that the drug diversion program and subsequent dismissal of charges was not a substantial benefit and was at most a possibility of a benefit. We disagree. In return for a guilty plea, Higgins was allowed to enter a drug diversion program that would, if completed successfully, result in the dismissal of the Class C felony and Class D felony charges. This is a substantial benefit. Higgins argues that only an assured benefit such as the dismissal of charges can be considered a substantial benefit. The fact that Higgins failed to receive the full benefits of the plea agreement because of her own noncompliance with the provisions of the plea agreement does not render the benefit insubstantial. The same argument could be made where probation is a part of a plea agreement since probation depends on the defendant's compliance with the terms of probation.

Additionally, Higgins's guilty plea was a pragmatic decision on her part. According to the probable cause affidavit, Higgins admitted to the arresting officer that she had used a counterfeit check at Gas America. Additionally, multiple witnesses identified her as the perpetrator.

Under these facts and circumstances, we conclude that the trial court did not abuse its discretion when it did not identify Higgins's guilty plea as a significant mitigating factor.

Affirmed.

MAY, J., and VAIDIK, J., concur.